No. 89-504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

MARILYN FINKELSTEIN,

Respondent.

ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED BY THE PETITION

Are there "special and important reasons," as required by Rule 17, for this Court to grant certiorari where, on an appeal by the Secretary of Health and Human Services from a district court's order remanding the case to the Secretary for further proceedings pursuant to 42 U.S.C. § 405(g), the court of appeals applied the "general rule" that remand orders to administrative agencies are not appealable and held that the particular order before it did not warrant application of the " arrow exception to the normal rule"?

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COUNTERSTATEMENT OF THE CASE

This case involves the routine application of the time-honored final judgment rule. The district court remanded this Social Security case to the Secretary of Health and Human Services (the "Secretary") for continued proceedings. Because the order was interlocutory, the court of appeals held it was not immediately appealable. The Secretary advances a number of arguments that would require the abandonment of the final judgment rule in favor of a rule allowing the government -- but not its adversaries -- to invoke the jurisdiction of the courts of appeals virtually at will. For the reasons discussed below, the petition should be denied.

A. The Course of Proceedings Before the Secretary

On November 25, 1983, Marilyn Finkelstein, a widow suffering a heart ailment, applied to the Department of

Health and Human Services, Social Security Administration (the "SSA") for widow's disability benefits pursuant to the Social Security Act, 42 U.S.C. §§ 301 et seq. (A 14).[1] The SSA denied her application on February 3, 1984, and again upon reconsideration on March 28, 1984. (Id.). On September 28, 1984, an Administrative Law Judge ("ALJ") found, after a hearing, that Mrs. Finkelstein's ailment did not make her a "disabled widow within the meaning of the Social Security Act." (Id.).

Under the Social Security Act, a widow may not obtain disability benefits unless she has a physical or mental impairment "of a level of severity which under regulations prescribed by the

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[1] "A -" refers to the Petitioner's Appendix to his Petition for a Writ of Certiorari. The court of appeals' opinion, filed March 3, 1989, appears in the Appendix at pages 1-12; the district court's opinion, filed February 19, 1988, appears at pages 13-18. The Secretary's Petition is cited as "Pet."

Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity." 42 U.S.C. § 423(d)(2)(B). The Secretary's regulations similarly provide that the widow's physical or mental impairments "must be of a level of severity to prevent a person from doing any gainful activity." 20 C.F.R. § 404.1577.

The ALJ rejected Mrs. Finkelstein's claim for benefits because he found that the evidence did not establish that her heart condition was "equivalent" to ischemic heart disease, one of the cardiovascular impairments listed in Appendix 1 to 20 C.F.R. Part 404, Subpart P. (A 16). The ALJ did not make any findings on whether Mrs. Finkelstein's impairment is "of a level of severity to prevent a person from doing any gainful" activity under 20 C.F.R. § 404.1577. (A 17). The ALJ's decision denying Mrs. Finkelstein

benefits became the final decision of the Secretary when the Appeals Council denied Mrs. Finkelstein's request for review on December 11, 1984. (A 14).

B. The Proceedings in the District Court

Mrs. Finkelstein filed suit in the United States District Court for the District of New Jersey, pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g) ("Section 205(g)"), for review of the Secretary's decision. (A 13). The district court correctly observed that it is required by Section 205(g) to uphold the ALJ's decision "if after review of the record there is substantial evidence supporting the decision." (A 13). The court noted that the ALJ properly "made clear on the record his reasons" for finding that Mrs. Finkelstein did not suffer from an impairment or combination of impairments which was the equivalent of a Listed

Impairment. (A 16). The district court held, however, that the SSA must consider the "functional impact" of the claimant's impairment in determining whether it precludes her from "engaging in any gainful activity" with in the meaning of 42 U.S.C. § 423(d)(2)(B) and 20 C.F.R. § 404.1577.[2] Because the record was "devoid of any findings regarding the functional impact" of Mrs. Finkelstein's heart ailment (A 17), the district court held that the case must be remanded to the Secretary for further proceedings for the ALJ "to inquire whether plaintiff may or may not engage in any gainful activity, as contemplated by the [Social Security] Act." (A 18). The district

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[2] The district court's decision that the Secretary must consider a claimant's residual functional capacity was consistent with cases decided by other courts. E.g., Kier v. Sullivan, No. 89-6095, to be reported at 888 F.2d 244 (2d Cir. October 23, 1989); Tolany v. Heckler, 756 F.2d 268, 271 (2d Cir. 1985); Marcus v. Bowen, 696 F. Supp. 364, 379-80 (N.D. Ill. 1988).

court therefore remanded the case "for good cause shown." (A 25).

C. The Proceedings in the Court of Appeals

The Secretary appealed the district court's remand order, contending that the statute and applicable regulations permit the ALJ to look only to whether a claimant's impairment meets or equals an impairment listed in the appendix to Subpart P of 20 C.F.R. Part 404 and do not require him to make the inquiry ordered by the district court. (A 2-3).

The court of appeals dismissed the appeal for lack of appellate jurisdiction. (A 19-20). The court first observed that remands to administrative agencies are not ordinarily appealable under 28 U.S.C. § 1291 because a remand order is "typically an interlocutory step in the adjudicative process and, therefore, not

a final order." (A 4). The court also discussed the "narrow exception to the normal rule of non-appealability . . . limited to cases in which an important legal issue is finally resolved and review of that issue would be foreclosed 'as a practical matter' if an immediate appeal were unavailable." (A 4-5).

The court of appeals held that "the particular district order" was "interlocutory, not final," because the district court "ordered consideration of an additional factor before final administrative adjudication of the benefit issue." (A 12). In rejecting the Secretary's invocation of the collateral order doctrine, the court of appeals found its decision in Bachowski v. Usery, 545 F.2d 363, 373-74 (3d Cir. 1976) (quoted with approval in Richardson-Merrell, Inc. v. Koller,

472 U.S. 424, 440 (1985)), to be controlling. (A 11 n.7).

The court of appeals denied the Secretary's petition for rehearing and rehearing in banc, with three of eleven judges voting to hold a rehearing in banc, on the basis of a desire to consider applying the collateral order doctrine, recently articulated in Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 328-32 (D.C. Cir. 1989), to the facts of this case. (A 21-24).

SUMMARY OF REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

This Court should deny the Secretary's certiorari petition for at least three reasons.

First, there was nothing about the court of appeals' decision that warrants review. The court applied well-settled principles of appellate jurisdiction to the specific interlocutory order before

it -- a remand order directing the Secretary to consider another factor in determining Mrs. Finkelstein's eligibility for Social Security benefits. The court carefully considered and properly rejected the Secretary's argument that "an important legal issue [was] finally resolved [in the district court] and review of that issue would be foreclosed" if immediate appeal were unavailable. (Part I, infra).

Second, the principles applied by the Third Circuit in this case are entirely consonant with the decisions of other appellate courts, including the Fifth Circuit's decision in Cohen v. Perales, 412 F.2d 44 (5th Cir. 1969), rev'd sub nom. Richardson v. Perales, 402 U.S. 389 (1971) (relied on by the Secretary to demonstrate the existence of a conflict). Those courts -- along with the Third Circuit -- have fashioned a set of principles guided by those laid down

by this court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546-47 (1949), and its progeny. Simply put, there is no conflict among the circuits. (Part II, infra).

Third, the Secretary's petition invites this Court to abandon principled concepts of finality and permit the government -- but only the government -- to appeal an adverse interlocutory district court remand. Such a new, lopsided rule would make piecemeal appellate adjudication of administrative proceedings routine and would work considerable inequity on applicants for Social Security benefits. (Part III, infra).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE COURT OF APPEALS' HOLDING DOES NOT WARRANT REVIEW BY THIS COURT.

A. The Court of Appeals Properly Applied the Final Judgment Rule.

The reasons for the final judgment rule, both practical and equitable, have been articulated repeatedly by this Court. First, "[t]he finality requirement in Section 1291 evinces a legislative judgment that '[r]estricting appellate review to "final decisions" prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy.'" Coopers & Lybrand v. Livesay, 437 U.S. 463, 471 (1978) (quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974)).

In addition, "[r]easons other than the conservation of judicial energy sustain the limitation. One is the elimination of delays caused by interlocutory appeals." Catlin v. United States, 324 U.S. 229, 233-34 (1945); accord, Van Cauwenberghe v. Biard, 108 S. Ct. 1945, 1949 n.3 (1988) ("avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals"); Cobbledick v. United States, 309 U.S. 323, 325 (1940) ("to be effective, judicial administration must not be leaden-footed").

Finally, "[p]ermitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system." Van Cauwenberghe v. Biard, 108 S. Ct. at 1949 n.8 (quoting Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981)).

For these reasons, the courts of appeals have "uniformly held that as a general rule, a [district court's] remand order [to an administrative agency] is 'interlocutory' rather than 'final,' and thus may not be appealed immediately (unless, of course, it is certified pursuant to § 1292)." Occidental Petroleum Corp. v. SEC, 873 F.2d at 329 (D.C. Cir. 1989) (collecting cases). This "general rule" is so well recognized that earlier this year the Secretary conceded "that, ordinarily, a remand order is not a final decision of the district court, as that term is construed pursuant to 28 U.S.C. § 1291, and thus provides no basis for our assertion of jurisdiction." Colon v. Secretary of Health and Human Services, 877 F.2d 148, 151 (1st Cir. 1989) (emphasis added) (cited by the Secretary, Pet. at 23).[3]

[3] Indeed, the Secretary has expressly taken this position and won in circuit

The district court's order in this case was a typical interlocutory remand, requiring "the consideration [by the Secretary] of an additional factor before final administrative adjudication" could take place. (A 12). It was a step in the process of administering the claim. In no way had there been "a decision by the district court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Van Cauwenberghe v. Biard, 108 S. Ct. at 1948 (quoting Catlin v. United States, 324 U.S. at 233).

As Justice (then Circuit Judge) Blackmun explained in holding that a

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after circuit. See, e.g., Memorial Hospital Sys. v. Heckler, 769 F.2d 1043, 1044 (5th Cir. 1985); Farr v. Heckler, 729 F.2d 1426, 1427 (11th Cir. 1984); Howell v. Schweiker, 699 F.2d 524, 525 (11th Cir. 1983); Gilcrist v. Schweiker, 645 F.2d 818, 819 (9th Cir. 1981); Dalto v. Richardson, 434 F.2d 1018, 1019 (2d Cir. 1970), cert. denied, 401 U.S. 979 (1971); Bohms v. Gardner, 381 F.2d 283, 285 (8th Cir. 1967) (Blackmun, J.), cert. denied, 390 U.S. 964 (1968).

remand to the Secretary for further proceedings is not immediately appealable, Bohms v. Gardner, 381 F.2d at 285,

> The district court merely vacated the Secretary's decision and remanded the case for reconsideration and, possibly, the reception of additional evidence. It neither granted nor denied the relief the claimant seeks. The adverse agency decision so vacated may of course be reinstated in due course but it may go the other way. Until the Secretary acts on the remand we have no insight as to what his eventual decision will be.

Accord, Tookes v. Harris, No. 79-3340, 614 F.2d 1296 (table) (5th Cir. March 25, 1980) (reported as an appendix to the opinion in Howell v. Schweiker, 699 F.2d at 527, 528 (the district court's "specific questions [for consideration of an additional factor on remand] indicate that the present decision is but a step toward the final judgement"); Dalto v. Richardson, 434 F.2d at 1018-19 (remand "for the taking of additional evidence" was "an interlocutory order and not

appealable"); Gilcrist v. Schweiker, 645 F.2d at 819.

B. The Court of Appeals Properly Held That This Case Did Not Warrant Application of the "Narrow Exception" to the Final Judgment Rule for Certain Collateral Orders.

The policy of finality "has been departed from only when observance of it would practically defeat the right to any review at all." Cobbledick v. United States, 309 U.S. at 324. This Court carved out a limited exception to the final judgment rule in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. at 546, for a "small class of cases which finally determine claims of right separate from, and collateral to, rights asserted in the action." In order that the exception not swallow the rule, this Court has repeatedly held that a collateral order must be "considered 'effectively unreviewable' absent

immediate appeal" in order to be appealable. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. at 376 ("to be appealable as a final collateral order, the challenged order must constitute 'a complete, formal and, in the trial court, final rejection,' Abney v. United States, 431 U.S. 651, 659 (1977), of a claimed right 'where denial of immediate review would render impossible any review whatsoever.' United States v. Ryan, 402 U.S. 530, 533 (1971)."); accord, Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 376 (1987); Richardson-Merrell, Inc. v. Koller, 472 U.S. at 430-31.

This Court has thus held that "to come within the collateral order doctrine articulated in Cohen, the order must satisfy each of three conditions: it must (1) 'conclusively determine the disputed question,' (2) 'resolve an important issue completely separate from the merits

of the action,' and (3) 'be effectively unreviewable on appeal from a final judgment.' Van Cauwenberghe v. Biard, 108 S. Ct. at 1949 (quoting Coopers & Lybrand v. Livesay, 437 U.S. at 468).

The principles articulated in Cohen and its progeny have been applied by the courts of appeals to find appellate jurisdiction in a limited class of appeals from district court remands to administrative agencies. E.g., Occidental Petroleum Corp. v. SEC, 873 F.2d at 332 ("the SEC . . . will not be able to appeal its own decision"); Stone v. Heckler, 722 F.2d 464, 467 (9th Cir. 1983); Cohen v. Perales, 412 F.2d at 48) ("[u]nless the Secretary is allowed to appeal from this order, he will never be able to reach the questions involved"). And -- as in this case -- the courts of appeals have regularly rejected requests to find jurisdiction under the collateral order doctrine where its application was

not warranted. E.g., Copeland v. Bowen, 861 F.2d 536, 539 (9th Cir. 1988); Harper v. Bowen, 854 F.2d 678, 681 (4th Cir. 1988); Farr v. Heckler, 729 F.2d at 1427; Howell v. Schweiker, 699 F.2d at 526; Bachowski v. Usery, 545 F.2d at 372.

In this case, the court of appeals correctly applied these principles to the order before it, holding that this case does not fall within the "narrow exception" to the final judgement rule. That conclusion was correct for at least four reasons.

1. The District Court's Remand Order Did Not Resolve "An Important Issue Completely Separate From the Merits of the Action."

This requirement, set out in the second part of the test articulated by this Court in Coopers & Lybrand v. Livesay, 437 U.S. at 468, defeats the use of the collateral order doctrine in this case. Far from being "completely

separate from the merits," the district court's order is both procedurally and factually integrated with the ultimate resolution of Mrs. Finkelstein's claim for benefits. Indeed, the Secretary concedes as much in his petition but urges the Court to disregard this defect. (Pet. at 16 n.9).

(a) The District Judge Plays an Integral Role in the Administrative Process Under Section 205(g).

Once a claim has been processed administratively, it may be reviewed by the district court pursuant to Section 205(g), which provides in pertinent part,

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party . . . may obtain a review of such decision by civil action . . . . brought in the district court . . . .
>
> The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without

> remanding the cause for a rehearing . . . .
>
> The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary but only on a showing that there is good cause for the failure to incorporate such evidence into the record in prior proceedings; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm has findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

The Secretary's attempt to minimize the district judge's role (Pet. at 16 n.9) ignores the intracies of the statutory scheme. This Court has observed that these "detailed provisions for the transfer of proceedings" back and forth between the district courts and the SSA "suggest a degree of direct interaction between a federal court and an

administrative agency alien to traditional review of agency action under the Administrative Procedure Act." Sullivan v. Hudson, 109 S. Ct. 2248, 2254 (1989). The unusual nature of Section 205(g) places the district courts "virtually as coparticipants in the process, exercising ground-level discretion of the same order as that exercised by ALJs and the Appeals Council . . . ." Id. (quoting J. Mashaw, et al., Social Security Hearings and Appeals 133 (1978)).

What allows for such interaction is the provision providing that the district court "may at any time order additional evidence to be taken before the Secretary" provided that the requisite "good cause" is shown. In fact, remands are the most common of all dispositions of Social Security cases by the district courts. See Division of Appellate Assessment of the Off. of

Policy & Procedures, Soc. Sec. Admin. Off. of Hearings & Appeals, Court Remands: Analysis and Recommendations 4 (December 1987). To be sure, there are cases where the claim for benefits has been finally adjudicated. Those cases are distinguished by an order of the district court finally disposing of the cause pursuant to that part of Section 205(g) granting the district court the power to affirm, modify or reverse the decision of the Secretary, with or without remanding the cause for a rehearing. See Tookes v. Harris, 699 F.2d at 528-29 (explaining the differences between the types of remand and the effect of those differences on appealability); Cohen v. Perales, 412 F.2d at 48 (same); see also pp. 25-27, 50-53, infra.

(b) The District Court's Order in This Case Was Factually Integrated with the Ultimate Resolution of the Case.

Here, the district court concluded that the Secretary failed to consider a necessary factor and remanded the case for further proceedings -- for the taking of more evidence -- not for a rehearing. The district court's order simply did not affirm, modify or reverse that of the secretary.

As other courts of appeals have held in precisely this situation, no final adjudication of the claim has taken place. For example, in Tookes v. Harris, the ALJ had made findings on the claimant's impairment, but failed to consider whether substantial gainful activity was available for the claimant in his locality. Id., 699 F.2d at 527-28. The district court, having acknowledged that its role was limited by Section 205(g) to determining whether

substantial evidence on the record as a whole existed to support the Secretary's determination, remanded for the consideration of the additional factor. On facts strikingly similar to those presented to the court of appeals in this case, the Tookes court -- like the Bachowski court -- distinguished Cohen v. Perales, 412 F.2d at 48, and dismissed the appeal.

The Tookes court explained the district judge's options under Section 205(g):

> A district judge can remand a case to the Secretary in three situations. 42 U.S.C. § 405(g) (1976). First, the court can remand for rehearing as part of its judgment affirming, modifying, or reversing the Secretary's decision. Second, the court can remand if the Secretary moves for remand before she files an answer. Third, the court "may, at any time, on good cause shown, order additional evidence." Id.

Tookes, 699 F.2d at 528. In applying the principles of Cohen and Perales to the order, the Tookes court held that because

the particular order fell into the third category -- an "order" to take "additional evidence" -- it was not appealable. "Not only was the remand not for 'rehearing' as the statute provides, but the [district] court's specific questions indicate that the present decision is but a step toward the final judgment. Review at this time would be intervention in an open, unfinished, and inconclusive matter." Accord, Copeland v. Bowen, 861 F.2d at 539 (remand "for the taking of additional evidence" was "an interlocutory order and not appealable"); Dalto v. Richardson, 434 F.2d at 1018-19 (same).

Like the district court in Tookes, the district court here remanded the case "for good cause shown," not for a "rehearing." (A 25).

2. The District Court's Remand Order May Be Reviewed at the Conclusion of All Proceedings in the District Court.

The Order at issue in this case does not meet the third requirement articulated in Coopers & Lybrand v. Livesay, 437 U.S. at 468, that the order must "be effectively unreviewable on appeal from a final judgment." If necessary, the district court's order may be reviewed whether or not the Secretary, after taking further evidence, grants Mrs. Finkelstein the benefits she seeks.

The Secretary contends that if he awards benefits on remand, he might "not have an effective opportunity for appellate review" of the order at issue here. (Pet. at 16-17 & n.10). The Secretary is wrong.

The action has not been dismissed. No judgment has been entered. Instead, according to the district court's order, "for good cause shown," the matter has

been "remanded to the Secretary for further proceedings." (A 25). Pursuant to Section 205(g), the Secretary must now either "modify or affirm his findings of fact or his decision or both." Whether the Secretary modifies or affirms his decision considering Mrs. Pinkelstein's capacity to do "any gainful activity," he is required to file "any such . . . decision" with the district court, and the district court may then enter "judgment affirming, modifying or reversing the Secretary's judgment." The language of the statute is mandatory. 42 U.S.C. § 405(g).

This clearly gives the Secretary the opportunity for effective appellate review after the conclusion of all the proceedings in the district court. As this Court explained last term, "the procedure set forth in 42 U.S.C. § 405(g) contemplates additional action both by the Secretary and a district court before

a civil action is concluded following a remand." Sullivan v. Hudson, 109 S. Ct. at 2255 (quoting Guthrie v. Schweiker, 718 F.2d 104, 106 (4th Cir. 1983)). For that reason, "there will often be no final judgment in a claimant's civil action for judicial review until the administrative proceedings on remand are complete." Id., 109 S. Ct. at 2255.

This Court's discussion of these procedures in Sullivan v. Hudson is consistent with Congress' explanation of the application of the Equal Access to Justice Act ("EAJA") to Section 205(g) cases:

> [A]fter the HHS review upon remand the agency must file its findings with the reviewing court. Thus the remand decision is not a "final judgment," nor is the agency decision after remand. Instead, the District Court should enter an order affirming, modifying, or reversing the final HHS decision, and this will usually be the final judgment that

> starts [the EAJA's] 30 days running.

H. Rep. No. 120, 99th Cong., 1st Sess. 19, reprinted in 1985 U.S. Code Cong. & Admin. New 132, 148.

There is thus no question that, as the Secretary has represented to the Third Circuit, he "must" and "will" "return to the district court and file a copy of the government's decision upon conclusion of any remand proceeding in which a claimant receives benefits." Brown v. Secretary of Health and Human Services, 747 F.2d 878, 884 (3d Cir. 1984) (emphasis in original).[4]

Against all this, the Secretary makes the unsupported assertion that "nothing in 42 U.S.C. 405(g) requires the Secretary, after a remand based on legal error in the Secretary's first decision,

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[4] The Secretary has followed such a procedure after remand in courts outside the Third Circuit as well. E.g., Miles v. Bowen, 632 F. Supp. 282, 283 (M.D. Ala. 1986).

to file with the district court a new decision in favor of the claimant." (Pet. at 17 n.10). That assertion is, in any event, irrelevant. Even if the statutory language is not considered mandatory, the Secretary cannot deny that he is, at the least, permitted to file such a decision and move the district court to "affirm . . . the decision" pursuant to Section 205(g).

After the district court's final judgment is entered, the Secretary may then appeal the adverse collateral remand order. "In an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Article III." Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 334 (1980). Indeed, this has been held to be the

appropriate procedure by more than one court in the Social Security context. Copeland v. Bowen, 861 F.2d at 539 (appeal of district court's remand order is to be taken after new decision by Secretary and affirmance by district court of Secretary's decision); Barfield v. Weinberger, 485 F.2d 696, 698 (5th Cir. 1973) (holding that Secretary may not appeal remand immediately); see also Harper v. Bowen, 854 F.2d at 681; Taylor v. Heckler, 778 F.2d 674, 677 n.2 (11th Cir. 1985); Brown v. Secretary of Health & Human Services, 747 F.2d at 883-85.

3. Nothing Renders This Order Effectively Unreviewable Absent Immediate Appeal.

Even if the Secretary were correct that he may in some circumstances be precluded from ultimately seeking review of this order -- and he is not -- that is no reason to allow an appeal now. The court of appeals correctly held that "'it

is not inexorably so' that consideration of this issue will escape review." (A 9). Indeed, the Secretary does not deny that his right to appeal will not be "irretrievably lost." He complains only that he "may not have an effective opportunity for appellate review." (Pet. at 16) (emphasis added). But the final judgment rule is not so pliable. As this Court has held, "the final judgment rule requires that except in certain narrow circumstances in which the right would be 'irretrievably lost' absent an immediate appeal, Richardson-Merrill Inc. v. Koller, 472 U.S. 424, 431 (1985), litigants must abide by the district court's judgments, and suffer the concomitant burden of a trial, until the end of the proceedings before gaining appellate review." Van Cauwenberghe v. Biard, 108 S. Ct. at 1950 (emphasis added).

There is no institutional interest that would be served by the alteration of this standard in the context of the Secretary's attempts to appeal cases brought under Section 205(g). As the court of appeals correctly predicted (A 11-12), other opportunities for appellate consideration of this issue arose. See cases cited p. 6 n.2, supra. Moreover, as Professor Wright has explained in his criticism of Cohen v. Perales, "[t]he interest of an institutional litigant in settling questions of law is apparent, but it seems a slender reed for immediate appeal." 15 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3914 at 551-52 n.43 (1976). That criticism is particularly penetrating when it concerns an agency that does not consider the holdings of district court decisions to be binding in the

adjudication of future cases.[5] The Secretary's desire, therefore, for quick appellate review of a district court decision applying a legal standard with which he disagrees is somewhat curious, and the institutional interests he puts forward (Pet. 15-18) should not be considered compelling.

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[5] Decisions by the district courts containing "interpretations of the law, regulations, or rulings which are inconsistent with the Secretary's interpretations" have never been considered by the ALJs as "binding on future cases simply because the case is not appealed." J. Mashaw, Social Security Hearings & Appeals at 141. Only in recent years has the SSA even begun to consider acquiescing -- in some limited circumstances -- to decisions of the courts of appeals. See Proposed Regulations Concerning Application of Circuit Court Law, 53 Fed. Reg. 46628 (1988) (proposing amendments to 20 C.F.R. Parts 404, 410, 416 and 422 that would implement regulations acquiescing to decisions of courts of appeals only).

4. The Secretary Could Have Requested an Appeal Pursuant to 28 U.S.C. § 1292(b).

Congress has, by enacting 28 U.S.C. § 1292(b), provided a process for discretionary appellate consideration of "an order [that] involves a controlling question of law as to which there is substantial ground for difference of opinion" where "an immediate appeal from the order may advance the ultimate termination of the litigation." Id. The district court's order involved a controlling question of law with which the Secretary disagreed. A reversal by the court of appeals would have terminated the litigation. Thus, this case could have been eligible for certification and appeal pursuant to Section 1292(b). But rather than pursue this method of appellate review, the Secretary attempted to invoke the collateral order doctrine. The

availability of Section 1292(b) as an avenue of review of remands to administrative agencies in appropriate cases provides sufficient relief for the Secretary without requiring this Court to create a new rule of appellate jurisdiction. The Secretary's failure to pursue an appeal under Section 1292(b) further supports the court of appeals' conclusion that it had no appellate jurisdiction. Van Cauwenberghe v. Biard, 108 S. Ct. at 1953-54; Bachowski v. Usery, 545 F.2d at 373; Barfield v. Weinberger, 485 F.2d at 697.

C. The Secretary's Argument That This Order is Effectively an Injunction Appealable Pursuant to 28 U.S.C. § 1292(a)(1) Should Not Be Heard and Is of No Merit.

The Secretary briefly raises in his Petition an assertion that the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) because the remand

order "had the effect of granting an injunction." (Pet. at 18). That novel theory was not raised in the court of appeals and should not be heard here.[6] "This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." Patrick v. Burget, 108 S. Ct. 1658, 1662 n.5 (1988).

In addition, the entire premise of the Secretary's theory -- that the order "granted partial relief on the merits and ordered further proceedings in a different forum" (Pet. at 19) -- completely ignores the teachings of this Court in Sullivan v. Hudson, 109 S. Ct. at 2254-55. As this Court has observed,

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[6] Nor did the Secretary make any request in the court of appeals, or indeed in this Court, for expedited consideration of the case pursuant to 28 U.S.C. § 1657, which requires such consideration for "any action for temporary or preliminary injunctive relief."

Section 205(g) calls for extensive interaction between the district court and the administrative agency. Moreover, if the Secretary were correct, every remand to every administrative agency would be appealable by any party under 28 U.S.C. § 1292(a)(1). That has never been the law.

Finally, even if the Secretary were correct that the district court's remand is effectively an injunction, he still has not met the additional requirements necessary for immediate review or orders having the "practical effect" of granting or denying an injunction: "a party seeking review [of such an order] also must show that the order will have a '"serious, perhaps irreparable consequence," and that the order can be "effectually challenged" only by an immediate appeal.'" Stringfellow v. Concerned Neighbors in Action, 480 U.S. at 379 (quoting Carson

v. American Brands, Inc., 450 U.S. 79, 84 (1981), quoting, in turn, Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955)); I.A.M. Nat'l Pension Fund Benefit Plan A v. Cooper Indus., 789 F.2d 21, 24 & n.3 (D.C. Cir.) (cited in the Secretary's Pet. at 19 n.11) cert. denied, 479 U.S. 971 (1986).[7]

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[7] Footnote three of the I.A.M. case, cited by the Secretary for the proposition that such a showing is not required "in all circumstances" (Pet. at 19 n.11), identifies a clearly irrelevant exception. Also, Cohen v. Board of Trustees of University of Medicine & Dentistry, 867 F.2d 1455, 1468 (3d Cir. 1989), the only other case cited by the Secretary for that proposition (Pet. at 19 n.11), is of no application here. It held only that "when an injunction is specifically applied for and granted, the party enjoined [need not] show . . . irreparable injury beyond that resulting from the availability of pendente lite enforcement by contempt in order to appeal under Section 1292(a)(1)."

II. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Placing primary reliance on a case decided by the Fifth Circuit in 1969, the Secretary asserts that "[t]he jurisdictional ruling by the Third Circuit in this case conflicts not only with the decision in [Cohen v. Perales, 412 F.2d at 48,] but also with the decisions of . . . . the First, Sixth, [Seventh], Ninth and Tenth Circuits," (Pet. at 23).[8] There is no conflict among the circuits for the following four reasons: (1) no court is in direct conflict with the Third Circuit's decision in this case; (2) the Perales court applied the same principles as did the court of appeals here; (3) Perales is clearly

[8] The alleged departure of certain panels from their "own contrary precedent" (Pet. at 24) is an intramural matter to be resolved by the courts of appeals themselves. See Davis v. United States, 417 U.S. 333, 340 (1974).

distinguishable; and (4) Perales is of questionable vitality.

A. No Court Is In Conflict With The Third Circuit.

The Secretary points to no case that is expressly in conflict with the Third Circuit's decision in this case, and we have found none. It should be no surprise that various courts, in applying the same fact-specific inquiry to different facts, have reached different -- but not inconsistent -- outcomes. Indeed, each of the courts pointed to by the Secretary as being "in conflict" with the Third Circuit (i.e. the First, Fifth, Sixth, Seventh, Ninth and Tenth) has "not followed" (in the words of the Secretary) Perales when the remand order being appealed from is not appealable. See, e.g., Copeland v. Bowen, 861 F.2d at 539 (9th Cir. 1988) (district court's remand "for further evaluation" not immediately appealable as final or collateral order);

Mall Properties, Inc. v. Marsh, 841 F.2d 440, 443 (1st Cir. 1988) ("the crucial distinction in these cases is not -- as [appellant] would contend -- simply the fact that the district court imposed a new or unsettled legal standard on the agency, but rather that unless review were accorded immediately, the agency likely would not be able to obtain review"), cert. denied, 109 S. Ct. 128 (1988).[9] None of these courts has pointed to the nature of the appellant as a ground for granting or denying appellate review. Indeed, the Mall Properties court expressly rejected that notion. 841 F.2d at 443.

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[9] Accord Loffland Bros. Co. v. Rougeau, 655 F.2d 1031, 1032 (10th Cir. 1981) (district court's decision to remand was neither final nor appealable collateral order); Tookes v. Harris, 699 F.2d at 527 (5th Cir. 1980) (same, distinguishing Perales); Whitehead v. Califano, 596 F.2d 1315, 1319 & n.2 (6th Cir. 1979); United Transportation Union v. Illinois C. R.R., 433 F.2d 566, 568 (7th Cir. 1970).

Instead of "following" or "not following" Perales, the courts have consistently applied the principles of Cohen to appeals from district court remands to administrative agencies. The decision in Occidental Petroleum Corp. v. SEC, 873 F.2d at 328-32, illustrates the differences between the case at hand and those in which courts of appeals have found remands to be appealable under the collateral order doctrine. That case involved a request under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), for documents that Occidental had provided to the SEC during the course of an investigation. After both Occidental and the FOIA requestor had had an opportunity to set out their positions to the FOIA officer, the SEC determined to release the documents. See 17 C.F.R. § 200.83. When Occidental sought to enjoin the documents' release, the district court concluded that the

administrative record was "inadequate for judicial review under the Administrative Procedure Act" and remanded the case to the SEC for further proceedings. 873 F.2d at 328. In holding that the district court's collateral remand order met all three of the Coopers & Lybrand v. Livesay requirements, the Occidental Petroleum court placed special emphasis on the fact that the central question at issue was "whether the district court correctly placed upon the SEC the burden of substantiating its determination." 873 F.2d at 332. This was because the SEC itself had no interest in the outcome of its decision to grant or deny confidentiality and no method to challenge the district court's rejection of its procedures. "Whether the SEC ultimately rules for disclosure or for confidential treatment of any particular document, it will not be able to appeal its own decision. Only Occidental or the

FOIA requestor, whichever is aggrieved, will be able to pursue the matter back to the district court and thence to this court." Id. (emphasis added).

Other cases relied upon by the Secretary (Pet. at 23-24) also demonstrate that a disparity in outcomes is not a conflict among the circuits. Those cases applied the test outlined in Cohen to different factual situations -- situations where the courts found that the Cohen test was met because the district court order concerned a claim that was completely separate from the merits and effectively unreviewable absent immediate appeal. Some of those cases involved, for instance, the jurisdiction of the district court to issue any order at all. E.g., Colon v. Secretary of Health and Human Services, 877 F.2d at 151 (issue of district court's jurisdiction immediately appealable under "Cohen exception to the

finality requirement"); Ensey v. Richardson, 469 F.2d 664, 666 (9th Cir. 1972) (same); Edgewater Hospital, Inc. v. Bowen, 857 F.2d 1123, 1129 (7th Cir. 1988) (concluding that district court did not "remand" but "finally determined the specific issue of jurisdiction and returned the case to the [Provider Reimbursement Review Board]"). Others involved the order of a district court to redetermine the claim under a new evidentiary standard. E.g., Pickett v. Bowen, 833 F.2d 280, 290-91 (11th Cir. 1987) (applying Cohen and concluding that redetermination of claim would render Secretary's "present objection moot and judicial review meaningless"); Huie v. Bowen, 788 F.2d 698, 703 (11th Cir. 1986) (applying Cohen and concluding that all three factors are met: "the fundamental legal issue . . . will become moot. Thus, review at another time will be meaningless."); Stone v. Heckler, 722

F.2d at 466-68 (collateral evidentiary ruling appealable under Cohen). Others arose in contexts other that Section 205(g). E.g., Occidental Petroleum Corp. v. SEC, 873 F.2d at 328-32; Bender v. Clark, 744 F.2d 1424, 1428 (10th Cir. 1984) (expressly departing from Cohen but finding appellate jurisdiction because the Bureau of Land management "has no avenue for obtaining judicial review of its own administrative decisions" under the Mineral Leasing Act, 30 U.S.C. § 226(b)(1)).

Finally, the Secretary points to what Professor Wright has termed a "small number of decisions [that] have allowed appeals without extended discussion," 15 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3914 at 551-52 & n.44.[10] The existence of those cases --

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[10] E.g., Edmond v. Secretary of Health, Education & Welfare, No. 89-3161 (6th Cir. April 19, 1989); Souch v. Califano, 599 F.2d 577, 578 n.1 (4th Cir. 1979);

each with a unique set of facts discussed only briefly if at all by the courts that decided them -- does not constitute one of the "special and important reasons" for granting a petition for writ of certiorari. S. Ct. R. 17.

B. The Principles Applied By The Third Circuit Are Not In Conflict With The Fifth Circuit's Perales Decision.

In appropriate circumstances, the Third Circuit itself has held remand orders to administrative agencies appealable. E.g., AJA Assocs. v. Army Corps of Eng'rs, 817 F.2d 1070, 1073 (3d Cir. 1987) (discussed by the court of appeals in this case at A 8-9); Horizons Int'l, Inc. v. Baldrige, 811 F.2d 154, 158 (3d Cir. 1987) (discussed by the

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Paluso v. Mathews, 573 F.2d 4, 8 (10th Cir. 1978); Lopez Lopez v. Secretary of Health, Education & Welfare, 512 F.2d 1155, 1156 (1st Cir. 1975); Gardner v. Moon, 360 F.2d 556, 558 n.2 (8th Cir. 1966); Jamieson v. Folson, 311 F.2d 506, 507 (7th Cir.), app. dismissed & cert. denied, 374 U.S. 487 (1963).

court of appeals at A 8); United Steelworkers Local 1913 v. Union R.R., 648 F.2d 905, 909 (3d Cir. 1981) (discussed at A 7). The fact that the Third Circuit did not blindly follow the outcome of the 1969 Perales decision in this factually distinct case cannot be used to create a conflict where none exists. In words applicable to this case, Judge Adams explained in Bachowski v. Usery, 545 F.2d at 372-73:

> This case does not present the same type of situation that the Fifth Circuit encountered in Perales. In that case, a failure to review the district court's guidelines, as to the admissibility of and the weight to be given to hearsay evidence, almost certainly would have foreclosed any possibility of review of that matter.

The court of appeals in this case held that the facts of Bachowski were controlling. (A 11 n.7). It should thus come as little surprise that, as the Secretary observes, "the Third Circuit did not even cite Perales and its progeny

in its decision in this case." (Pet. at 24 n.18).

C. Perales Is Clearly Distinguishable From This Case.

The Perales court recognized and clearly articulated the principles of the collateral order doctrine set out in Part I, supra, and considered by the court of appeals in this case. Indeed, the Perales court (412 F.2d at 48-49) quoted extensively from Cohen v. Beneficial Industrial Loan Corp., 337 U.S. at 546.

More important, the Perales court observed that "not all [remand] orders under 42 U.S.C. § 405(g) are appealable" and actually anticipated that the situation presented by this case -- "an order sua sponte by the court for the taking of additional evidence" -- is not immediately appealable. 412 F.2d at 48. But the Perales district court had remanded the case for a "full new

hearing" under a new evidentiary standard. Thus, the Perales court held, "[u]nless the Secretary is allowed to appeal from this order, he will never be able to reach the questions involved, because on the next appeal, if there is one, the sole question may be the substantiality of the evidence." Id. at 48. That, as the Perales court itself explained, is not this case. Id. Here, the district court has found the Secretary's decision that Mrs. Finkelstein's impairment does not equal a "Listed Impairment" to be supported by substaintial evidence. (A 16). The effect of the district court's remand on any new decision by the Secretary -- based on her residual functional capacity -- will therefore be clear and distinct.

Numerous courts have also distinguished the facts presented in

Perales for precisely the reasons that the Bachowski court did.

Most telling, the Fifth Circuit itself, in a case not cited by the Secretary in his petition, has distinguished Perales. Tookes v. Harris, 699 F.2d at 529 (discussed at pp. 25-27, supra). The court in that case specifically rejected the Secretary's reliance on Perales because Perales involved "a collateral evidentiary ruling." Accord, e.g., Howell v. Schweiker, 699 F.2d at 526 ("[I]n both Perales and Gold, however, the court stressed that the district court had not only remanded the case, but also had made an evidentiary ruling adverse to the Secretary."); Farr v. Heckler, 729 F.2d at 1427 (distinguishing Perales as involving a "separate evidentiary ruling that would come within the Cohen doctrine"); Cranston Oil Service Co. v. Schlesinger, 595 F.2d 1203, 1205 (Temp.

Emer. Ct. App. 1979); see also Chastang v. Heckler, 729 F.2d 701, 702 (11th Cir. 1983) (distinguishing Perales to dismiss Secretary's appeal); Copeland v. Bowen, 861 F.2d at 539 (9th Cir. 1988) (distinguishing Stone v. Heckler, 772 F.2d at 465-68 (9th Cir. 1983) (relied on by the Secretary to demonstrate that the Ninth Circuit is in conflict with the Third (Pet. at 23)) as a collateral evidentiary order effectively unreviewable on subsequent appeal).

D. The Continued Vitality Of Perales Itself Is Questionable.

In another Fifth Circuit case not cited by the Secretary in his petition, Newpark Shipbuilding & Repair, Inc. v. Roundtree, 723 F.2d 399 (5th Cir.) (in banc), cert. denied, 469 U.S. 818 (1984), the court overruled its prior cases applying the collateral order doctrine to appeals from remands by the Benefits Review Board in appeals under 33 U.S.C.

§ 921(c). In banc, the Fifth Circuit held: "Our court now returns to the time tested doctrine that a remand order of the Board is interlocutory and unappealable as a matter of right, without exception." Newpark Shipbuilding & Repair, Inc. v. Roundtree, 723 F.2d at 407 n.8 (emphasis added). There is little reason to believe that the Fifth Circuit would not at least consider the ruling in Newpark in addressing future attempts to appeal remand orders by other administrative agencies.

III. THE SECRETARY WOULD HAVE THE COURT ENUNCIATE AN UNPRINCIPLED, IMPRACTICAL AND INEQUITABLE RULE THAT WOULD MAKE PIECEMEAL REVIEW OF ADMINISTRATIVE ADJUDICATIONS ROUTINE.

At bottom, the adjudicatory principle the Secretary seeks to apply is outcome-based: he would have the Court announce a rule allowing the Secretary to appeal when aggrieved by a district court

decision but prohibiting a claimant from doing so. (Compare Pet. at 23 with Pet. at 22 n.14). The Court should decline the Secretary's invitation to depart from all its decisions under Cohen and create such a rule, which would be unprincipled in theory, impractical in application, and inequitable in practice.

A. The Secretary's Rule Would Be Unprincipled.

Adopting the Secretary's rule would require a dramatic shift in focus from the nature of the order appealed from to the nature of the putative appellant. There is no difference based on neutral principles of finality between an appeal by the Secretary and one by a claimant. The Secretary therefore seeks an across-the-board rule allowing appeals by the Secretary (indeed any administrative agency) but never allowing appeals by the claimant. It was precisely this sort of bias that the

Court rejected when it disposed of the death-knell doctrine. Coopers & Lybrand v. Livesay, 437 U.S. at 476. Indeed, this Court's focus has always been on the type of order appealed from, not the party taking the appeal. E.g., Van Cauwenberghe v. Biard, 108 S. Ct. at 1947 (order denying motion to dismiss on ground of forum non-conveniens); Richardson-Merrell, Inc. v. Koller, 472 U.S. at 432 (order granting motion to disqualify counsel in a civil action); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. at 377 (order denying motion to disqualify counsel); Coopers & Lybrand v. Livesay, 437 U.S. at 469 (order denying motion to certify class action). The Secretary's rule would be a dramatic and unwarranted departure from these precedents.

B. The Secretary's Rule Would Be Impractical.

The Secretary claims that institutional efficiency would be served by his proposed rule because "a rule of non-appealability also would impose an unwarranted burden" on the Social Security Administration, which would be required "to conduct additional proceedings that would prove to be unnecessary and wasteful of scarce resources." (Pet. at 18). That is astounding. The finality rule often requires litigants to endure long trials; in contrast, this administrative hearing will probably require no more than a few hours of an ALJ's time. Routine appealability would not ease any burden on the Social Security Administration. It would simply shift resources to where they do not belong -- from deciding claims to bringing appeals in the federal appellate courts. Indeed, in other cases

raising this issue, Secretary has argued successfully for holding the remand hearing before an appeal may be taken. See cases cited at p. 15 n. 3, supra. Moreover, the district court's decision in this case does not raise nationwide institutional concerns. The Secretary does not consider this district court opinion binding even in the Third Circuit. See pp. 35-36 & n.5, supra.

Finally, the Secretary ignores the important institutional concerns this Court has repeatedly articulated in support of the final judgment rule. See pp. 12-14, supra. Those institutional concerns outweigh the Secretary's desire to obtain immediate review for reasons explained by this Court in Richardson-Merrell, Inc. v. Koller:

> "It would seem to us to be a disservice to the Court, to litigants in general and to the idea of speedy justice if we were to succumb to enticing suggestions to abandon the deeply-held distaste for piecemeal litigation

> in every instance of temptation. Moreover, to find appealability in those close cases where the merits of the dispute may attract the deep interest of the court would lead, eventually, to a lack of principled adjudication or perhaps the ultimate devitalization of the finality rule as enacted by Congress." Bachowski v. Usery, 545 F.2d 363, 373-74 (CA3 1976).

Id., 472 U.S. at 440. Moreover, the Secretary's rule would make appellate review of district court remands to all administrative agencies routine, imposing a heavy burden on circuit judges, "who -- more than any other segment of the judiciary -- are struggling desperately to keep afloat in the flood of federal litigation." Board of Trustees of Keene State College v. Sweeney, 439 U.S. 25, 26 (1978) (Stevens, J., dissenting).

C. The Secretary's Rule Would Be Inequitable.

The burden of appellate review falls squarely on Social Security claimants. Indeed, claimants are already caused tremendous hardship by a program

"that couples substantive harshness with unparalleled procedural indulgence." J. Mashaw, Social Security Hearings & Appeals at 134. According to the Government Accounting Office, disability claimants must wait, on average, over a year before an ALJ makes an initial decision on their claims. U.S. Gen. Accounting Office, Social Security: Selective Face-to-Face Interviews With Disability Claimants Could Reduce Appeals 13, Table 1.2 (GAO/HRD-89-22 April 1989). For those claimants who then proceed to district court -- their fourth level of review -- the average length of time between their initial application and the completion of proceedings following a district court remand is close to four years. Id. Because of the Secretary's appeal, Mrs. Finkelstein, who applied for benefits over six years ago, has not even reached this stage. The burden imposed by such delay during appellate review is

already unbearable, as one authority explains:

> During this time period, many disabled persons are forced to subsist on state public assistance programs. Others are left with no means of subsistence. The benefits these claimants receive after years of administrative and judicial proceedings can hardly compensate for the loss of benefits when they were most needed. While waiting for the application of circuit law to their cases, claimants are deprived of basic necessities such as food and necessary medical care. They literally may not survive until the day when benefits are finally granted.

Diller & Morawetz, "Intracircuit Nonacquiesence and the Breakdown of the Rule of Law: A Response to Estreicher & Revesz," to be published in 99 Yale L.J. 801, 815-16 (January 1990) (footnotes omitted).

Remarkably, the Secretary asks this Court to inject yet a fifth level of routine appellate review into the Social Security process. It is respectfully

submitted that this Court should decline the Secretary's invitation.

CONCLUSION

The court of appeals properly applied well-settled principles of appellate jurisdiction to the remand order before it. Its decision was consistent with those of this Court and of other courts of appeals applying the same principles. The Secretary has not offered any special and important reason for this Court to consider transforming the limited exception carved out in Cohen into a license for wholesale disregard of the finality rule imposed by Congress.

The petition for writ of certiorari should be denied.

December 19, 1989

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CERTIFICATE OF SERVICE

This is to certify that on the 18th day of December, 1989, three true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served by overnight mail on the Solicitor General, Department of Justice, 10th and Pennsylvania Avenues, N.W., Washington, D.C. 20530, and one true and correct copy was served by overnight mail on the Office of General Counsel to the Secretary of Health and Human Services, 200 Independence Avenue, S.W., Room 722A, Washington D.C. 20201.

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